SUPREME COURT, STATE OF COLORADO

Case No. 93SA17

PLAINTIFFS-APPELLEES' ANSWER BRIEF

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, and THE CITY COUNCIL OF ASPEN,

Plaintiffs-Appellees,

v.

ROY ROMER as Governor of the State of Colorado, GALE NORTON as Attorney General of the State of Colorado, and THE STATE OF COLORADO,

Defendants-Appellants.

On Appeal from the Denver District Court
Case No. 92CV7223
Honorable H. Jeffrey Bayless, Judge

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ISSUE

Did the district court abuse its discretion by preliminarily enjoining enforcement of Amendment 2 on the substantial likelihood that Amendment 2 violates the Equal Protection Clause of the Fourteenth Amendment by invidiously discriminating against gay men, lesbians and bisexuals?

STATEMENT OF THE CASE

On November 3, 1992, a majority of Colorado voters approved a state constitutional amendment ("Amendment 2") that provides:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be self-executing.

The amendment deprives all branches and departments of state government (the legislative, executive, and judicial), state agencies (including state universities and colleges), political subdivisions of the state (including counties), municipalities and school districts of the power to remedy "any claim of discrimination" based on "homosexual, lesbian or bisexual orientation."[1]

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[1]Sexual orientation is an enduring erotic, affectional or romantic attraction to individuals of a particular gender. See Gregory Herek, Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 Law & Sexuality 133, 134 (Summer 1991). Sexual orientation subsumes many different aspects of human sexuality. These include: (1) engaging in specific sexual behaviors or conduct with partners of a particular gender; (2) having a personal preference for or ongoing attraction to partners of a particular gender: (3) developing a private personal identity as gay, lesbian, heterosexual or bisexual; (4) establishing a public identity based on sexual orientation; and (5) identifying with a community defined by its sexual orientation. Id. The drafters of Amendment 2 chose the terms "homosexual," "lesbian," and "bisexual" to prevent Amendment 2 from covering heterosexual sexual orientation. Statement of Tony Marco, ballot title hearing, Sept. 4, 1991, ex. 7 at 9.

On November 12, 1993, the plaintiffs filed suit in Denver District Court. They sought a declaration that Amendment 2 was unconstitutional and an injunction to prevent the governor and the attorney general from enforcing the amendment. The individual plaintiffs challenged Amendment 2 as violating their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution on two grounds: that Amendment 2 did not rationally advance any legitimate purpose, and that the amendment placed unique burdens on the plaintiffs' ability to participate in the political process.

Individual plaintiffs also challenged the amendment on several First Amendment grounds: that Amendment 2 violates their right to petition their government for a redress of grievances; that it violates their rights to free expression and association, including the chilling effect of Amendment 2 on persons who would otherwise speak freely on matters related to gay, lesbian or bisexual orientation; that it violates the constitutional prohibition against the establishment of religion; and that it is unconstitutionally vague.[2] Finally, because Amendment 2 prohibits state courts from

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[2]The federal constitutional claims were brought under 42 U.S.C. § 1983. The plaintiffs also relied on the provisions of the Colorado Constitution that correspond to the federal provisions. See Merrick v. Board of Higher Education, 116 Or.App. 258 (1992) (electorate's repeal of executive order banning sexual orientation discrimination violated Oregon's constitutional guarantee of free expression similar to First Amendment guarantee). In addition, the individual plaintiffs claimed that the use of the initiative to adopt Amendment 2 violates the republican form of government guaranteed to each citizen by art. IV, sec. 4 of the United States Constitution and the Colorado Constitution. They also claimed that Amendment 2 constitutes a revision of the state constitution that may be effected only through the constitutional convention process

enforcing statutes, regulations, ordinances and policies concerning discrimination based on sexual orientation, they maintained that Amendment 2 violates the Supremacy and Due Process Clauses of the United States Constitution and the access to the courts provision of art. II, sec. 6 of the Colorado Constitution.

Two of the governmental plaintiffs -- the cities of Denver and Boulder that have ordinances prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation[3] -- asserted that Amendment 2 should be construed not to affect their home rule powers because the amendment does not indicate that it was intended to override home rule authority and because its text omits "charters" from the list of forbidden government legislation. The Boulder Valley School District RE-2, which has a policy permitting students to seek redress for discrimination based on sexual orientation, claimed that Amendment 2 may violate local control over educational policies protected by art. IX, sec. 15 of the Colorado Constitution. All of the governmental plaintiffs claimed that Amendment 2 places them in the position of incurring legal liability for violation of the federal constitution under the Supremacy Clause.[4]

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provided in art. XIX, sec. 1 of the Colorado Constitution.

[3]Denver Municipal Code, art. IV, secs. 28-91 through 28-116 (ex. 23); Boulder Revised Code, secs. 12-1-2 through 4 (ex. 38).

[4]The defendants attempt to raise the issue of whether the governmental plaintiffs have standing to challenge Amendment 2 by claiming that the equal protection clause is not designed to protect state instrumentalities against state action. Op. brf. at 7, n. 14. This issue is both meritless and not properly before this court. First, Denver, Boulder, and the school district have

After the defendants and the court turned down the plaintiffs' requests for an expedited hearing on the merits (I:36-41), the plaintiffs filed a motion seeking preliminary relief on two of the individual plaintiffs' claims: that Amendment 2 denies gay men, lesbians and bisexuals equal protection of the law under the Fourteenth Amendment and that Amendment 2 violates the First Amendment's protection for expressive conduct. Following a four day evidentiary hearing, the district court granted the plaintiffs' motion, ruling that there is a reasonable probability that they will prevail on the merits of their equal protection claim;[5] the district court did not address the First Amendment claim. The defendants appealed, and this court granted review.

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not challenged Amendment 2 on the ground that they have a right to equal protection. Second, the question of government standing is not ripe for resolution on appeal because the district court has not addressed the arguments advanced by the governmental entities. Third, it is well-established that home rule cities have standing in state court to challenge the constitutionality of state law in order to protect their home rule powers. Mesa Verde Co. v. Montezuma County, 831 P.2d 482, 485 (Colo. 1992); City of Colorado Springs v. State, 626 P.2d 1122 (Colo. 1981). Likewise, school districts have standing to protect their power of local control of education. Colo. Const., art. IX, sec. 15; § 22-32-109(1)(w), 9 C.R.S. (1988). See Missouri v. Jenkins, 495 U.S. 33, 57 (1990).

[5]The court considered the standards in Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982) and ruled that the plaintiffs have a reasonable probability of proving that Amendment 2 is unconstitutional; that if Amendment 2 denies plaintiffs their fundamental constitutional rights, they suffer real, immediate and irreparable harm as a matter of law; that the plaintiffs do not have a plain, speedy and adequate remedy at law; that the injunction would not disserve the public; that the public has no interest in an unconstitutional amendment; and that the injunction would preserve the status quo. VII:19-21,30.

STATEMENT OF FACTS

At the preliminary injunction hearing, the plaintiffs made two equal protection arguments. First, the plaintiffs argued that Amendment 2 burdens a fundamental right because it impermissibly burdens participation in the political process and thus can be upheld only if it furthers a compelling governmental purpose. Second, the plaintiffs argued that Amendment 2 does not rationally advance any legitimate governmental purpose and thus does not pass constitutional scrutiny under the rational basis test.

In support of their argument, four of the individual plaintiffs testified, describing their personal experiences with discrimination against them because they are lesbian or gay and their efforts to obtain governmental protection from discrimination. The plaintiff Richard G. Evans, who is gay, is director of Denver's office of citizen response. IV:43. When he was employed by the Denver District Court clerk's office, Evans helped persuade the governor to sign an executive order prohibiting discrimination on the basis of sexual orientation in state employment.[6] IV:50-52. Evans worked in the successful campaign to defeat a referendum that would have repealed the portion of the Denver anti-discrimination ordinance that provided a remedy for discrimination on the basis of sexual orientation. IV:53-54.

In addition to testifying about his political participation, Evans, age 33, described the development of his identity as a gay

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[6]Executive Order, Dec. 10, 1990 (ex. 46); see also 4 CCR 801-1 (1992) (ex. 47).

man. He testified that he has known since he was about seven years old that he was "different." IV:43,46. His response as a child was to isolate himself, to be a loner. IV:46. It was common for school children to denigrate someone by calling that person a "fag," and Evans protected himself by being quiet. IV:46. As a teenager, he was depressed, did poorly in school because he did not go to classes, and contemplated suicide. IV:47. Evans did not "come out of the closet"[7] and disclose his sexual orientation to his family until he was 29 years old because he feared that his parents would reject him. IV:45.

The plaintiff Angela Romero, age 42, is a Denver police officer and a lesbian. IV:101. Romero has known since she was about age six that she was "different." IV:101. She "figured out what she was" when one of her cousins saw two people of the same sex holding hands and made fun of them, saying "that's what queers did." IV:102. From her family and from her church she learned that "homosexuality was evil." IV:102. She did not want to acknowledge that part of herself and attempted "to pass as

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[7]To be "in the closet" refers to an individual hiding from himself/herself or the outside world a "significant amount of same sex interest." III:84;IV:47. "Coming out" refers to the process by which an individual comes to understand his or her same sex interest and perhaps to express it. III:85. Being "out" allows Evans to serve as a positive role model, as someone who can speak out for people who do not feel that they can speak out for themselves. Evans described the "experience that comes to mind the most often" as his inability before he came "out" to help a man with whom he worked who was effeminate and whose job was to answer the telephone. IV:56. The young women in the office "took great pleasure" in calling the man the "phone fag." IV:57.

heterosexual." IV:102. Shortly before she was to have been married at age 29, she acknowledged her identity as a lesbian.

Romero began work as a police officer in 1977. IV:129. In 1987 she was promoted to the police department's community services division to work as a resource officer with schools in the inner city. IV:104,129,131. She loved her job "with all her heart and soul" and received "rave reviews." IV:105. In July 1988, one of her supervisors -- who several months earlier had given her a performance evaluation of "outstanding" -- gave her a negative evaluation. IV:105,107,142. She learned that the supervisor had discovered that she was a lesbian because she had written on her log sheet that she purchased some research materials from a lesbian bookstore. IV:107. In October, she was demoted and transferred from the school resource program to a "more suitable position" in traffic control. IV:109. When she learned that she had no remedy for the transfer, Romero suggested that sexual orientation be included among the categories for protection from discrimination in police employment. IV:111.

After Romero came out as a lesbian and challenged discrimination in the police department, some officers refused to provide assistance or backup for her on high risk calls. IV:112-114. Romero protested, and her protest resulted in the adoption of the policies that she earlier had suggested. IV:115. The policies include the addition of "sexual orientation" to the police department's rule prohibiting officers from discriminating against one another. IV:123-25;exs.33,35. The department also included sexual

orientation in the list of characteristics (such as race and gender) that a police officer is to disregard when a person is in danger or distress. IV:122;ex.32. Finally, the department revised its radio policy to prohibit use of derogatory language relating to sexual orientation (IV:124-25;ex.34); the policy change was to prevent officers from calling gay men "fags" on the police radio. IV:116.

The plaintiff Paul Brown is a 39 year old gay man. IV:78-79. He is a computer operator for the Colorado Department of Natural Resources. IV:13. He grew up on a farm in Douglas County in a family with fundamentalist religious values. IV:79. He understood that he was "somehow different" -- before "things take on any sort of sexual connotation" -- when he was 6 or 7 years old. IV:79. By age 8, he had become withdrawn, and as he grew older, he knew it was not safe to let anyone know about "the person that lived inside of him." IV:83. When he went to 7th grade and rode the school bus to Castle Rock, he could hear the senior high boys at the back of the bus talking about "queers," and he came to understand that they were "talking about people like me." IV:83.

Brown's parents communicated their church's view of homosexuality to him, a view which made him feel "absolutely isolated" when he was growing up. IV:80. He prayed that a change would happen, that he would not be "queer" anymore. IV:84. He considered suicide, not so much out of despair as from loneliness. IV:84. Although Brown told his parents a number of years ago that he was

gay, they continue to believe that his sexual orientation can or will change. IV:85-86.

Brown worked for a wholesale distributor in Denver for eleven years; he "came out" within a year of the time he started working there. IV:87-88. A co-worker painted "Paul is a fag" on the front of the building facing the avenue where everyone parked; the building had to be sandblasted and the co-worker was fired. IV:88-89. Later, a new manager rehired the co-worker who painted the graffiti and fired Brown and a lesbian co-worker because of their sexual orientation. IV:89. Brown then found employment with the department of natural resources. IV:90. Given his previous experience, the governor's executive order prohibiting discrimination on the basis of sexual orientation in state employment provides him "some comfort." IV:91.

The plaintiff John C. Miller, age 55, is a professor of Spanish and chair of the Languages and Cultures Department at the University of Colorado in Colorado Springs. IV:4. Miller is gay. IV:5. He knew that he was attracted to other males as early as age 8, although he then did not know what homosexuality was. IV:5. He tried to pass as heterosexual, marrying twice and fathering two children. IV:6. Miller believes that it is important to be "out" as a professor who can be a role model for students who need someone to discuss with them instances of discrimination or who need referrals for counseling. IV:10-12.

Miller chairs the Four Campus Faculty Council for the University of Colorado. IV:4. In 1990, the faculty council

requested the University of Colorado regents to add sexual orientation to the university's non-discrimination clause. The regents refused.[8] IV:16. Miller also attempted -- unsuccessfully -- to convince the city council in Colorado Springs to add sexual orientation to the city's non-discrimination ordinance. IV:21-22.

The successful efforts by the plaintiffs and others to obtain governmental protection against discrimination on the basis of sexual orientation led to the creation of CFV. Although CFV's campaign for Amendment 2 began in Colorado Springs, the "no special rights for homosexuals" theme of CFV's campaign for Amendment 2 was developed by national organizations that comprise the "religious right."[9] See ex.18 (letter to CFV from National Legal Foundation founded by the Reverend Pat Robertson that assisted CFV in drafting Amendment 2).

CFV described the purposes of Amendment 2 in the materials that it filed with the Legislative Council (III:54-56,63-64; exs.11,12) and in its campaign brochures (Exs.21,22). The purposes included protection of "traditional family values and structures," protection of children from sexual molestation, protection of individuals' rights to view homosexuality as immoral, protection of

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[8]Colorado State University, Mesa College, and the University of Southern Colorado have policies that provide protection against discrimination on the basis of sexual orientation. IV:18.

[9]The "religious right" combines conservative religious beliefs that rest on a literal interpretation of the Bible with political beliefs in anti-communism, a prominent place within society for church and family, and a traditional role within the family for the husband, wife and children. V:78,113. The California-based Traditional Values Coalition led by the Reverend Louis Sheldon developed the "no special rights" theme in 1989 and 1990.

"authentic minorities" from dilution of their protected civil rights, reduction of the "deadly consequences" of AIDS and the cost of treating the disease, and promotion of the view that homosexuality can be cured.[10]

CFV stated that gays and lesbians "threaten . . . to undermine traditional family values and structures" because "[h]omosexual 'marriages' will only erode traditional family structures, sap financial resources from legitimate, traditional families (by increasing disease-driven insurance rates, etc.) and cause measureless misery to helpless children, who would be the most wretched victims of such 'marriages.'" Ex.11 at 32-33;ex.12 at 55. CFV asserted that it is "common knowledge that homosexuals are notorious practitioners of sex with minors." Ex.11 at 7-8;ex.12 at 9. CFV materials described at length alleged "deviant behavior" by gay men and lesbians. Ex.11 at 10,13-15,29-30,39;ex.12 at 4,7,13,16, 19-23,43-44,62-63.

CFV described gays and lesbians as society's "most persistent and change-resistant communicators of sexually transmitted diseases." Ex.11 at 9;ex.12 at 11. CFV argued that "occupations like health care, child care and food care" are "sensitive" to gay transmittal of "a host of highly communicable, even incurable, diseases." Ex.11 at 18. And, according to CFV, "by the mid-1990's,

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[10]On August 9, 1991, the Legislative Council submitted a series of questions to CFV regarding Amendment 2. Ex.3. At a public hearing to address the questions, the Council inquired, "What is the interest of the state or people that is being furthered by this amendment?" Id. The Legislative Council notes recorded CFV's reply as "No response." III:47,70-71;ex.4.

it will be difficult for sick persons to get hospital beds because of overcrowding by AIDS-infected homosexuals." Ex.11 at 19.

CFV described its "deeper purpose" as "bringing a message of hope to individuals who . . . have chosen to go down a wrong road." Ex.11 at 2,42;ex.12 at 3. CFV believed that "homosexual practices are misguided efforts to fill love needs not provided for in early childhood by same-gender parents." Ex.11 at 42;ex.12 at 67. Arguing that "gay behavior can be . . . changed," CFV called for gays, lesbians, and bisexuals "to forsake" homosexuality. Ex.11 at 42;ex.12 at 67-68.

In response, the plaintiffs presented expert testimony on the psychological study of sexual orientation. III:76,80. The origin of sexuality -- whether homosexual or heterosexual -- appears to involve multiple genetic and environmental factors. III:89-90.[11] CFV emphasized an environmental understanding of sexual orientation because it was then easier to argue that homosexual orientation can be changed. III:88. Even "the most staunch environmental theorists," however, posit that sexual orientation is set in place between ages 4 and 7, a view that is inconsistent with the notion that a child of that age chooses sexual orientation. III:89. Individuals often are not fully aware of their sexual orientation until late adolescence or young adulthood, sometimes later. III:81. Sexual orientation is highly resistant to change by the time a person is an adult. III:94.

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[11]See Chandler Burr, Homosexuality and Biology, The Atlantic, Mar. 1993, at 47.

Heterosexuals as well as lesbians, gays and bisexuals raised in an anti-gay culture incorporate anti-gay prejudice. III:112. For heterosexuals, this can result in varying degrees of prejudice or bias. III:83. Individuals who are prejudiced against gays and lesbians give a variety of stereotypes as the rationale for discriminating against them. III:102. One of the stereotypes is that gay men are more likely than heterosexual men to sexually molest children. III:109. Another commonly-held stereotype is that contact with lesbians and gay men may influence a child to become lesbian or gay. III:110.

The stereotyping process often ascribes hyper-sexuality or particularly egregious sexuality to unpopular minorities. III:109. A number of studies, however, suggest that proportionately more heterosexual men than gay men molest children.[12] II:463-68; III:110. Similarly, heterosexual orientation is set in place quite early, and the notion that it can be shifted by contact with gays and lesbians is erroneous.[13] III:110. A number of studies demonstrate that there is no relationship between the sexual orientation

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[12]The defendants' expert witness, psychologist Joseph Nicolosi, acknowledged that there is no evidence to support the contention that homosexuals engage in more child molestation than heterosexuals. V:171-72.

[13]Nicolosi, the defendants' expert psychologist, testified that male homosexuality results from a deficient sense of masculinity and that "reparative therapy" can convert gay males to heterosexuals. V:163,173. Nicolosi admitted that he had not "cured" anyone using reparative therapy. V:184. The American Psychological Association has discredited "reparative therapy." III:134-38;V:175-81.

of a parent and the eventual sexual orientation of the parent's children. III:111.

For lesbians and gay men, the incorporation of anti-gay prejudice may result in feelings of inferiority and isolation, particularly in adolescence. III:83. Anti-gay prejudice keeps individuals from developing a support system, and "remaining in the closet" predisposes people to loneliness and depression. III:112,115. Because gays and lesbians do not have intergenerational support, each individual has to "reinvent the wheel." III:113.

The mayors of Boulder and Aspen and a Denver city councilwoman testified about the need for anti-discrimination ordinances. IV:145-90;V:42-65. For all three cities, Amendment 2 would eliminate protection under their ordinances for claims of discrimination filed by lesbians, gays or bisexuals but would not eliminate protection for claims of discrimination on the basis of sexual orientation filed by heterosexuals. IV:154,209;V:50-51.

One of the protections that would be eliminated by Amendment 2 is voluntary protective custody in the Denver jail (and in prisons around the state) for persons who because of sexual orientation prefer not to live with the jail's general population. IV:194,196. Amendment 2 would also undermine county and school district programs designed to deter teen suicide. V:129. Gay and lesbian youth who are at the point of acknowledging their sexual orientation account for nearly 50% of teen suicide attempts and about one-third of completed teen suicides. V:129. In addition,

Amendment 2 would remove prohibitions on judges in the performance of judicial duties and lawyers in representing clients from discriminating on the basis of sexual orientation.[14]

Another protection that Amendment 2 would eliminate is section 10-3-1104, 4A C.R.S. (1992 Supp.) of the Colorado Insurance Code[15] that prohibits discrimination on the basis of sexual orientation in insurance underwriting. V:138,145. As a result, insurers could resort to the prior practice of not writing insurance for persons they believed might be gay. V:143. The provision prohibits

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[14]Canon 3(A)(9) of the Code of Judicial Conduct (September 1, 1991) provides, "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including, but not limited to, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so." Rule 1.2(f) of the Colorado Rules of Professional Conduct provides, "In representing a client, a lawyer shall not engage in conduct that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process."

[15]Section 10-3-1104 provides, "(1) The following are defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

(f)(VI) Inquiring about or making an investigation concerning, directly or indirectly, an applicant's, an insured's, or a beneficiary's sexual orientation in:

(A) An application for coverage; or

(B) Any investigation conducted in connection with an application for coverage;

(VII) Using information about gender, marital status, medical history, occupation, residential living arrangements, beneficiaries, zip codes, or other territorial designations to determine sexual orientation;

(VIII) Using sexual orientation in the underwriting process or in the determination of insurability . . . ."

redlining (the refusal of some insurance companies to write health or life insurance for persons who lived in residential areas such as Capitol Hill, identified by zip codes) and the refusal to write insurance for persons engaged in certain occupations (barbers, cosmetologists, and florists) or who designated a non-related individual as an insurance beneficiary. V:143.

The plaintiffs demonstrated the need for protection from discrimination on the basis of sexual orientation and argued that denying them the ability to participate in the political process at all levels and before all branches of local and state government violated their Fourteenth Amendment right to equal protection. The plaintiffs urged the district court to enjoin Amendment 2 from becoming effective because they met the standards for a preliminary injunction.

The district court entered the injunction, ruling that the plaintiffs have a reasonable probability of proving that Amendment 2 is unconstitutional beyond a reasonable doubt. VII:30. The court found that private biases motivated Amendment 2 and determined that the plaintiffs have a fundamental right not to have the state endorse and give effect to private biases.[16] The court ruled that at the hearing on the merits the state will have to show a

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[16]The court ruled that Amendment 2 is not facially neutral, that it applies to an identifiable class, and that Bowers v. Hardwick, 478 U.S. 186 (1986), -- in which the United States Supreme Court upheld sodomy laws against a due process right to privacy challenge -- concerned conduct, not status; therefore, the plaintiffs had a valid equal protection claim. VII:28-29.

"substantial and compelling government interest" to justify enforcement of Amendment 2.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY PRELIMINARILY ENJOINING ENFORCEMENT OF AMENDMENT 2 BECAUSE AMENDMENT 2 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The defendants characterize Amendment 2 as simply a neutral effort "to re-align the rights of the citizenry of this State with those provided by federal law and generally recognized throughout the rest of the country." Op. brf. at 16. Far from being neutral legislation, Amendment 2 places unique burdens on the ability of gay men, lesbians, and bisexuals to participate in the political process.

There are at least two ways in which Amendment 2 deprives gay men, lesbians, and bisexuals of equal protection of the laws. First, Amendment 2 burdens a fundamental constitutional right to participate equally in the political process. These burdens are subject to strict scrutiny: they must be struck down if the government cannot advance a compelling state interest to justify the burden on a fundamental right. As Judge Bayless found, the defendants have been unable to show any compelling state interest advanced by Amendment 2.[17]

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[17]The plaintiffs also made several claims that Amendment 2 violates their First Amendment rights. They presented only one of the First Amendment claims in their motion for a preliminary injunction. The claim presented was that Amendment 2 -- by sweeping aside every potential means of redress for private retaliation -- increases the risk of engaging in expressive activity for lesbians, gay men, and bisexuals. If the government substantially increases the risk that an individual will experience private retaliation for protected expression, the First Amendment

Second, Amendment 2 lacks even a rational basis for the burdens imposed on gay men, lesbians, and bisexuals.[18] As even the defendants concede, "[t]he government must always have a rational basis to discriminate against homosexuals and bisexuals, and that rational basis must be applied to the specific context under consideration." Op. brf. at 17. Because Amendment 2 only serves to burden lesbians, gay men, and bisexuals because of a desire to harm a politically unpopular group, it has no rational basis.

A. Amendment 2 Burdens the Fundamental Right of Plaintiffs to Participate in the Political Process.

The plaintiffs argued before the district court that Amendment 2 burdened their fundamental right to participate in the political

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requires that the government demonstrate a compelling justification for exposing those who engage in expressive conduct to increased risk. N.A.A.C.P. v. Alabama, 357 U.S. 449, 458-64 (1958); see also Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431, 1435, 1462-69 (1992) (documenting widespread violence against gays and lesbians and arguing that state stigmatization of gays and lesbians and failure to prevent such violence increases private violence against gays and lesbians). The district court did not address the claim.

[18]Amendment 2 should also be subjected to heightened scrutiny because Amendment 2's discrimination against gay men and lesbians is gender-based on its face. Whether Amendment 2 affects one's ability to secure protection from discrimination depends entirely on one's gender. See Andrew Koppelman, Note, The Miscegenation Analogy: Sodomy Laws as Sex Discrimination, 98 Yale L. J. 145 (1988). Under Amendment 2, men are burdened for acts or attractions that women may perform or possess without being burdened; likewise, under Amendment 2, women are burdened for acts and attractions that men may have without sacrificing their ability to secure protection from discrimination. In short, but for the gender of an individual, Amendment 2 would not burden that individual. Cf. McLaughlin v. State of Florida, 379 U.S. 184 (1964) (miscegenation laws that forbid both blacks and whites from marrying each other constitute illegal racial discrimination, despite the Florida law's equal application to both races); see Koppelman, 98 Yale L. J. at 149-151.

process because it required gay men, lesbians, and bisexuals, but no other group in Colorado, to amend the state constitution before they could meaningfully petition for any administrative or legislative relief from discrimination. The district court agreed with the plaintiffs that Amendment 2 burdened the plaintiffs' fundamental right.[19] On appeal, the defendants argue primarily that the district court erred because the plaintiffs do not have a fundamental right to be free from all discrimination. Op. brf. at 18-41.

The defendants misunderstand -- and do not address -- the plaintiffs' argument. The plaintiffs do not argue that Amendment 2 deprives them of a fundamental right to be free from discrimination. Rather, the plaintiffs argue that they have a fundamental right to participate in the political process on equal terms with other groups and constituencies. By removing issues crucially important to plaintiffs from the normal political process, Amendment 2 burdens the plaintiffs' right to participate politically. As a result, strict scrutiny is required in this case not

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[19]The plaintiffs extensively briefed the theory that Amendment 2 violated plaintiffs' fundamental right of political participation; the district court held that Amendment 2 violated a fundamental "right not to have the state endorse and give effect to private biases." Read in light of the arguments actually presented to the district court, this holding is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation by its endorsement of private bias. However, even if the district court did not rule on the political participation argument presented to it, this court may affirm on grounds different than those upon which the district court relied, so long as appellee's rights under the judgment are not increased. Farmer's Group, Inc. v. Williams, 805 P.2d 419, 428 (Colo. 1991) (an appellee "may defend the judgment of the trial court . . . on any ground supported by the record, so long as the party's rights are not increased under the judgment").

because the minorities at issue should be recognized as suspect classes,[20] but because Amendment 2 creates classifications that impinge upon the fundamental right of political participation.

As the defendants concede, in order to understand the scope and effect of Amendment 2, it is necessary to "consider the state of things existing when the amendment was adopted." Op. brf. at 13. Prior to the enactment of Amendment 2, all Colorado residents could seek protection from discrimination by seeking legislative or administrative relief from the various branches of Colorado's state and local governments. Some residents succeeded in obtaining such

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[20]Several federal appellate courts have ruled that classifications based on sexual orientation are not "suspect" and therefore not entitled to strict scrutiny. However, in Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992), the Ninth Circuit invoked the "active" rational basis standard enunciated in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

Classifications based on homosexual orientation are inherently suspect and should be subject to strict scrutiny. See Watkins v. United States Army, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring); Jantz v. Muci, 759 F. Supp. 1543, 1551 (D. Kan. 1991), rev'd on other grounds, 976 F.2d 623 (10th Cir. 1992) (noting that three-judge panel could not overrule Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984). This Court need not reach the issue of whether a classification based on homosexual orientation is a suspect one because strict scrutiny of discriminatory classifications that impinge upon fundamental rights is clearly required.

The defendants suggest that the plaintiffs have abandoned any effort to argue that gay men, lesbians and bisexuals constitute a suspect or quasi-suspect class because their complaint did not allege that they are such a class. Op. brf. at 19, n. 27. The plaintiffs have not waived the legal argument that classifications based on sexual orientation are inherently suspect or quasi-suspect. I:296;III:97. There is no requirement that a motion for a preliminary injunction be based upon all possible claims. And there is no requirement that a complaint contain legal arguments; it need only contain factual allegations that support the general equal protection claim.

protection through local ordinances, state statutes and executive orders.

Amendment 2 fundamentally altered equal access to the political process. After Amendment 2's enactment, one identifiable group -- gay men, lesbians, and bisexuals -- is singled out and barred from using the normal state and local political process to secure relief from discrimination. Every other group in Colorado -- even groups like veterans, heterosexuals, and divorcees who are not protected from private discrimination under federal law -- can seek protection from discrimination by petitioning their state and local governments.

The normal assumption underlying judicial review of legislation is that "even improvident decisions will be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." Vance v. Bradley, 440 U.S. 93, 97 (1979).[21] The courts, however, cease to accept this assumption when oppressive legislation infects the political process itself. Under such circumstances, the normal political safeguards cannot be trusted to protect citizens from oppressive legislation, and the judiciary is forced to intervene. Reynolds v. Sims, 377 U.S. 533, 565 (1964);

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[21]Although the defendants assert that enjoining enforcement of the amendment implicates "the right of the people of Colorado to govern themselves," op. brf. at 20, Amendment 2 is not entitled to special deference. A citizen's constitutional rights cannot be infringed simply because a majority of people choose to do so. Lucas v. Colorado General Assembly, 377 U.S. 713, 737 (1964); see Julian Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503 (1990).

see also Washington v. Seattle School District, 458 U.S. 457, 467-70 (1982); United States v. Carolene Products Co., 304 U.S. 144, 152-53 n. 4 (1936); James Madison, Federalist No. 51, in The Federalist Papers (Kramnick ed. 1987); John Hart Ely, Democracy and Distrust (1980).

Therefore, the Supreme Court has long held that the right to equal participation in the political process is a fundamental right that may not be abridged except for compelling state interests. Kramer v. Union Free School District No. 15, 395 U.S. 621, 627 (1969). Cf. Norman v. Reed, 60 U.S.L.W. 4075, 4077 (1992) ("constitutional interest of likeminded voters to gather in pursuit of common political ends" cannot be abridged without compelling state interest). Legislation may violate the fundamental right to participate in the political process by actually disenfranchising part of the electorate, Kramer, 395 U.S. at 627; Cipriano v. City of Houma, 395 U.S. 701 (1969); by placing citizens in unequally sized legislative districts, preventing them from casting an equally weighted vote, Reynolds, 377 U.S. 533; or by depriving a portion of the electorate of the right to place their preferred candidate on the ballot, Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979). See generally Laurence Tribe, American Constitutional Law, 1062-1153 (2d ed. 1988).

The Supreme Court has also held that legislation burdens the right to participate in the political process if it prevents the normal political institutions from acting on legislation desired by

an identifiable group. Washington, 458 U.S. 457; Hunter v. Erickson, 393 U.S. 385 (1969). By preventing legislatures or other political bodies from ever voting on issues of special importance to an identifiable group of voters, such laws prevent the identifiable group from being able to cast a meaningful vote.

The state does not violate any fundamental right of political participation when it restructures the political process even-handedly, making it more difficult for anyone to seek a certain type of governmental action. Gordon v. Lance, 403 U.S. 1 (1971); Washington, 458 U.S. at 467-70. However, because the right to equal participation in the political process is essential to effective representative government, measures that restrict any identifiable group's ability to bring about change through the ordinary political processes are highly suspect under the Equal Protection Clause. Even if members of the identifiable group can cast a vote for the local or state legislative body, their vote is a mere formality if the legislative body is prevented from acting on the issues significant to the identifiable group of voters. As the court noted in Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 655 n. 9 (Cal. App. 4 Dist. 1991), when a law strips the normal political institutions of "the power to grant redress of the subject grievance," then "the right [to petition the government] becomes a hollow exercise."

Embedding such bias against an identifiable group in the political process, therefore, violates the equal protection clause of the Fourteenth Amendment. In Hunter, for instance, the Court

invalidated a city charter amendment, adopted pursuant to a popular initiative, that repealed existing anti-discrimination legislation and further provided that the city council could implement no ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of the city's voters. The Court held that

> the State may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any group smaller representation than another of comparable size. Cf. Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964); Avery v. Midland County, 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114 (1968).

Id. at 393 (emphasis added). While the city was not constitutionally obligated to forbid private discrimination by enacting a fair housing ordinance, the city could not exclude "any particular group" from at least attempting to persuade the city council to enact such an ordinance. Hunter held that such an obstruction to an identifiable group's political participation was subject to strict scrutiny.

In Washington, 458 U.S. 457, the Supreme Court -- relying on the equal protection principles announced in Hunter -- overturned an initiative prohibiting mandatory busing to integrate the public schools. The Court articulated the central principle in Hunter: laws structuring political institutions or allocating political power according to non-neutral principles making it more difficult for certain minorities to achieve favorable legislation are as impermissible as denying such minority groups the vote. Washington, 458 U.S. at 470, 476. The Hunter charter amendment

transferred the power to eliminate housing discrimination from the city council to the city electorate, and the Washington initiative removed the school district's authority to remedy de facto racial segregation and gave it to the voters of the entire state. The Washington initiative made the normal political process less accessible for an identifiable group, in violation of the Equal Protection Clause.

Reitman v. Mulkey, 387 U.S. 369 (1967) presents another instance in which a state constitutional amendment unconstitutionally removed an issue important to a minority from deliberation through the normal political process. In Reitman, an initiated measure amended the California Constitution to protect property owners' right to discriminate in the sale or rental of their property. Reitman, 387 U.S. at 370. The effect of the amendment was to repeal exisiting state prohibitions on racial discrimination in housing and to prohibit passage of measures in the future.

The Reitman Court held that the amendment violated the equal protection clause because it made "the right to discriminate . . . on racial grounds . . . immune from legislative, executive, or judicial regulation at any level of the state government." Id. at 377. The Court rejected the defendants' contention, echoed by defendants in this case, that such immunization of the right to discriminate constituted state neutrality toward discrimination, stating that the amendment "will significantly encourage and involve the State in private discriminations." Reitman, 387 U.S. at 381.

Amendment 2 is similar to the Reitman, Hunter and Washington initiatives. It prohibits all state and local governmental entities from ever enacting any "statute, ordinance, regulation, or policy" that would protect gay men, lesbians, or bisexuals from discrimination. Before Amendment 2's enactment, these groups could at least attempt to influence legislation and regulation at the state and local level by petitioning their representatives for desired action. Amendment 2 eliminates this ability to influence the ordinary political process: on those issues of importance to this identifiable group, the representatives of gay men, lesbians, and bisexuals are rendered incapable of granting relief. The right of gay men, lesbians, and bisexuals to vote for such representatives is thus not equal to the voting rights of other citizens: in effect, gay men, lesbians, and bisexuals simply have less ability to influence representatives than every other group in Colorado.

Defendants seem at some points in their brief to argue that strict scrutiny is reserved for legislation directed against racial groups. Op. brf. at 24. This is obviously incorrect: legislation infringing on fundamental rights such as the right to participate in the political process also is subject to strict scrutiny. Many of the earliest voting rights cases did not involve discrimination against any suspect class whatsoever but rather involved discrimination against such non-suspect groups as non-property owners, Kramer, 395 U.S. at 631 (1969), military personnel, Carrington v. Rash, 380 U.S. 89, 94 (1965), and urban residents, Avery, 390 U.S. at 484-86; Reynolds, 377 U.S. at 568. The Court struck down the

state laws at issue in these cases not because they involved discrimination against a racial group or other suspect class but rather because they limited an identifiable group's ability to advance its interests by diluting the group's voting power or limiting its franchise.

In particular, Hunter stated that there was no constitutional difference between discriminating against "any particular group" by "making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than any other of comparable size." Hunter, 393 U.S. at 393 (emphasis added). In support of this proposition, the Court cited Reynolds and Avery, two cases that involved the classification of urban residents, hardly a suspect class. Therefore, Hunter expressly extended its principle to cases that did not involve race or any other suspect class. Rather, as Hunter noted, the principle that a state may not make it more difficult for an identifiable group to enact legislation in its behalf extends to "any particular group."

Amendment 2 places a substantial and unique burden on gay men, lesbians and bisexuals as they seek to participate in the political process. The Supreme Court has ruled that this method of reallocating political power is unconstitutional unless the state demonstrates a compelling governmental purpose. Thus, this Court should uphold the district court's enjoining enforcement of Amendment 2 because here the defendants cannot demonstrate such a purpose.

B. Amendment 2 Lacks a Rational Basis for the Unique Burdens that it Places on Gay Men, Lesbians, and Bisexuals.

At a minimum, equal protection requires that distinctions drawn by the government be "rationally related to a legitimate governmental interest." United States Department of Agriculture v. Moreno, 413 U.S. 528, 533 (1973). See also City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446-47 (1985); Pruitt v. Cheney, 963 F.2d 1160, 1165-66 (9th Cir. 1991), cert. denied, 61 U.S.L.W. 3418 (1992). The U.S. Supreme Court has stated that "the rational basis test is 'not a toothless one,'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 438 (1982), and it has not hesitated to strike down legislation that could not rationally advance any legitimate purpose. See, e.g., Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989); Cleburne, 473 U.S. 432; Moreno, 413 U.S. 528 (1973). See also Phan v. Commonwealth of Virginia, 806 F.2d 516, 521 n. 6 (4th Cir. 1986); Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 414 (N.D.N.Y. 1987), vacated in part as moot and appeal dismissed, 888 F.2d 230 (2d Cir. 1989).

Judge Bayless found that Amendment 2 served to "endorse and give effect to private biases." VII:28. This finding is reversible only for clear error. Defendants' brief confirms Judge Bayless' finding. The defendants offer four purposes that Amendment 2 might rationally advance. According to the defendants, Amendment 2 "promot[es] associational and religious rights, maintain[s] the integrity of established civil right protections, and achiev[es] statewide uniformity on this divisive issue [of civil rights protections for gay men, lesbians, and bisexuals]."

Op. brf. at 42-43. The defendants also contend that Amendment 2 is "sustainable . . . as expressing society's moral judgment that certain behavior or orientation should not give rise to additional legal protections."[22] Id. at 43.

As will be explained below, none of these four proffered rationalizations establishes that Amendment 2 rationally advances a legitimate purpose. Amendment 2 cannot be justified as an expression of "society's moral judgment," because, as Judge Bayless found, such "moral judgment" in this case amounts to no more than private bias against lesbians, gay men, and bisexuals. Such private bias is not a legitimate purpose. Moreover, Amendment 2 does not rationally advance the three other purposes proffered by defendants, because it is both overinclusive and underinclusive for the accomplishment of these ends.

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[22]The defendants suggest that the district court is restricted to the Legislative Council's analysis in ascertaining whether there is a legitimate governmental purpose for Amendment 2. Op. brf. at 5-6, 42-43. The Legislative Council's interpretation, however, is not binding. Carrara Place v. Board of Equalization, 761 P.2d 197, 203 (Colo. 1988). In Epperson v. Arkansas, 393 U.S. 97, 107-08 (1968), for example, the United States Supreme Court examined newspaper advertisements and letters to the editor to ascertain the purpose of an initiative prohibiting the teaching of evolution in the public schools. See Hans Linde, When Is Initiative Lawmaking Not Republican Government, 17 Hastings L.Q. 159, 172 (1989) (testing initiative for evils of "passion" and "self-interest" that Framers wanted to prevent from tainting government "implies a deeper inquiry into the measure's origins, background, and contemporaneous expressions of public opinion than merely substituting the text of voter pamphlets and explanatory ballot statements for conventional legislative history").

1. Private Bias Against Gay Men, Lesbians, and Bisexuals, Even When Styled as a "Moral Judgment," is Not a "Legitimate Purpose" that Justifies Amendment 2.

At the outset, it is important to establish what purposes the state may legitimately seek to advance through its laws. The defendants apparently maintain that private bias against a group can constitute a legitimate basis for a legal distinction. Op. Brf. at 38. This contention is incorrect.

Contrary to the defendants' suggestion, antipathy arising out of hostility or groundless stereotypes is not a legitimate purpose justifying a law under the equal protection clause. As the U.S. Supreme Court stated in Palmore v. Sidoti, 466 U.S. 429 (1984), "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore, 466 U.S. at 434 (emphasis added). The Palmore court overturned a state court decision changing custody of a minor child on the basis of social disapproval of one parent's interracial relationship because such private bias could never be a legitimate basis for state action.

The defendants attempt to distinguish Palmore by arguing that Palmore prohibits only racial bias from being a legitimate purpose of state law. The Supreme Court, however, has never limited its holding in Palmore to race-based classifications. On the contrary, the Supreme Court has consistently held that hostility toward any group, even a non-suspect class, cannot be the legitimate purpose of a law. In Cleburne, 473 U.S. 432, for instance, the court held that "mere negative attitudes" of neighbors toward the residents

Palmore, Moreno and Cleburne, therefore, held that private bias against any group, even a non-suspect class, is not a legitimate purpose for a law to advance. This holding has been widely accepted by both federal and state courts in many non-racial contexts. See, e.g., Bannum, Inc. v. City of Louisville, Ky., 958 F.2d 1354, 1360-61 (6th Cir. 1992) (mere desire of neighbors not to live near former convicts in community training center is not rational basis for law where all evidence shows that former convicts are well-behaved); Geo-Tech Reclamation Industries, Inc. v. Hamrick, 886 F.2d 662, 666 (4th Cir. 1989) ("unreflective and unreasoned public sentiment" against waste facility is not a rational basis); Marks v. City of Chesapeake, 883 F.2d 308, 311 (4th Cir. 1989) (neighbors' unsubstantiated hostility to palmistry is not rational basis for denying permit to operate palmistry parlor); Burstyn v. City of Miami Beach, 663 F.Supp. 528, 537 (S.D. Fla. 1987) ("unsubstantiated fear and prejudice" of citizens cannot supply rational basis for restrictions on adult congregate care living facilities for elderly and disabled residents).

As Judge Bayless found, the overwhelming evidence suggests that Amendment 2's purpose was to endorse and give effect to private biases against lesbians, gay men, and bisexuals. Such hostility against these groups can no more justify Amendment 2 than it could justify the laws burdening hippies in Moreno or mentally handicapped persons in Cleburne.

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Defendants, however, contend that Amendment 2 can be justified as an expression of "society's moral judgment that certain behavior

or orientation should not give rise to additional legal protections." Op. Brf. at 43. Defendants rely on Bowers v. Hardwick, 478 U.S. 186, 196 (1986), to support their claim that "moral judgment" automatically justifies discrimination against lesbians, gay men, and bisexuals. According to defendants, "[a]fter Bowers v. Hardwick, it cannot be doubted that government action vis-a-vis homosexuality stands on a different plane from the impermissible type of private bias condemned in Reitman and Palmore." Op. Brf. at 26 (emphasis added).

Defendants misstate Bowers' holding in suggesting that Bowers immunizes all "moral judgments" from constitutional scrutiny. Bowers' holding concerning moral judgments was much more narrow: the Bowers Court held only that laws penalizing sodomy do not necessarily violate substantive due process simply because they were motivated by society's moral consensus. Bowers, 478 U.S. at 196 ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed") (emphasis added).

Bowers' holding that moral motivation does not automatically invalidate a law hardly entails the defendants' extraordinary assertion that moral motivation automatically validates such a law. Such a conclusion would make the inquiry under the rational basis test into a meaningless pleading exercise: the electorate's choices automatically would be validated whenever they were described as expressions of morality. The catch-all phrase "moral judgment"

cannot by itself insulate discrimination from judicial scrutiny when the moral judgment cloaks hostility against a group. Given that most if not all laws are expressions of some moral conception, Bowers, 478 U.S. at 496, the defendants' broad contention would automatically supply a rational basis for every law. The rational basis test is deferential. It is not judicial abdication.

As explained above, hostility to a politically unpopular group is not a legitimate purpose. Characterizing hostility as a "moral judgment" does not change this illegitimacy. If, as Judge Bayless found, Amendment 2 is justified by nothing more than private bias against gay men, lesbians, and bisexuals, then it is unconstitutional.

The defendants also rely on Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) to argue that, because Bowers held that states may prohibit sodomy, therefore Colorado may burden the ability of gay men, lesbians, and bisexuals to petition for relief from discrimination. Op. brf. at 27-28. This is a non sequitur for two reasons.

First, Bowers does not contain any broad carte blanche allowing discrimination against gay men and lesbians on the basis of their orientation. Bowers held only that there is no fundamental constitutional right to commit a particular sexual act. Nothing in Bowers addresses whether states may burden individuals based on their "sexual orientation" -- their values, beliefs and identities -- even when that orientation is not expressed in any illegal act.

Are we argu about conduct section OK?

By its terms, Amendment 2 forbids any government in Colorado from prohibiting discrimination on the basis of "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships." (emphasis added). Contrary to the Padula court's statement on which defendants rely, 822 F.2d at 103, sexual conduct and orientation are distinct concepts: a person may have a gay, lesbian, or bisexual identity without engaging in gay, lesbian, or bisexual conduct. See Janet Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 U.C.L.A. L. Rev. 915, 944 (describing and documenting "distinction between homosexual behavior and homosexual identity, between 'doing' and 'being' gay") (attached as Appendix A); Gregory Herek, Myths About Sexual Orientation, supra note 1 at 134; Pruitt, 963 F.2d at 1166 n. 5 (noting that Bowers "was a case relating to conduct, not orientation" and is therefore not a "barrier to active rational basis review").

It is difficult to conceive of a state's legitimate interest in directing the state's police power against a person's "orientation" -- that is, a person's identity -- regardless of that person's conduct or deportment. Bowers certainly does not suggest that burdening persons based only on their orientation, rather than their sexual conduct, is rational. Halley, 36 U.C.L.A. L. Rev. at 975-76 ("the 'homosexual acts' encompassed by [Bowers] are almost never at issue when the government imposes burdens on a person's sexual identity"). On the contrary, where burdens on sexual orientation are at issue, the state's legitimate interests are so

attenuated that the only plausible purpose of the law is hostility to the burdened group.

Bowers is distinguishable from this case for a second reason: Bowers concerned a challenge based on substantive due process. This case, by contrast, involves a claim based upon the equal protection clause of the Fourteenth Amendment, a clause that the Bowers Court explicitly declined to address in its opinion. Bowers, 478 U.S. at 196 n. 8. These constitutional provisions serve very different purposes. Under the theory of substantive due process, rights that are "deeply rooted in this Nation's history and tradition" are protected against state interference. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (Powell, J., concurring). See also Cass Sunstein, Sexual Orientation and the Constitution, 55 U. Chi. L. Rev. 1161, 1170-1174 (1988) (attached as Appendix B); Long Island Lighting Co., 666 F. Supp. at 417-422. By contrast, equal protection protects individuals from irrational discrimination. Even if the right to perform certain sexual acts is not fundamental, it does not follow that individuals of a particular sexual identity may be subjected to differential treatment with respect to non-sexual activities -- petitioning for protection from discrimination -- based on their sexual orientation. Sunstein, Sexual Orientation and the Constitution, 55 U. Chi. L. Rev. at 1174.

Defendants cite three cases in support of their contention that Bowers bars the equal protection challenge being raised here. See Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987); Woodward

v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989), cert. denied, 494 U.S. 1001 (1990). All of these cases are easily distinguishable from this case in that they involve prohibitions on employment of homosexuals by either the U.S. Armed Services or the F.B.I. The courts upheld the military regulations in these cases by citing the judiciary's traditional deference to the military's judgment concerning the services' internal discipline, morale, and composition, See Ben-Shalom, 881 F.2d at 465; Woodward, 871 F.2d at 1077. The courts upheld intelligence organizations's determinations concerning national security and intelligence gathering for similar reasons. See, e.g., High-Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 577 (9th Cir. 1990) (describing special deference to executive branch "decisions on protecting classified information"). None of these cases support the proposition that burdens on lesbian and gay orientation are always constitutional in the very different context of civilian life.

Moreover, more recent decisions have recognized that Bowers does not bar equal protection challenges to discrimination on the basis of sexual orientation. In Pruitt, 963 F.2d 1160, for instance, the Ninth Circuit held that Bowers did not bar an equal protection challenge to the Army's regulations barring homosexuals from the Army Reserve because Bowers "was a case relating to conduct, not orientation." Id. at 1166 n. 5. The Pruitt Court reversed a district court's order dismissing the plaintiff's challenge for failure to state a claim, stating that the Army would

So if the "orientation" part of A-Z removed, the constitutional?

have to establish on the record that its policy against homosexuals had a rational basis. Id. at 1166. In particular, the Pruitt court noted that the district court ought to have employed "the type of 'active' rational basis review employed by the Supreme Court in City of Cleburne." Id. at 1165-66 (citation omitted).

Other courts have gone farther than the Pruitt court and actually invalidated regulations discriminating against gay men, lesbians, and bisexuals, on the ground that such discrimination lacks even a rational basis. In Meinhold v. United States Department of Defense, 808 F.Supp. 1455 (C.D. Cal. 1993), Judge Hatter held that the Department of Defense policy of banning gays, lesbians, and bisexuals from the military did not have any rational basis and therefore violated the equal protection clause of the Fourteenth Amendment. Despite the military context, the Meinhold court refused to defer to military judgment because it could find no record evidence of any rational basis for the defense department policy, aside from "cultural myths and false stereotypes." 808 F.Supp. 1458.

Likewise, in Citizens for Responsible Behavior, 2 Cal. Rptr. 2d 648, a California appellate court affirmed the City of Riverside's decision not to place on an initiative ballot an ordinance very similar to Amendment 2. The proposed ballot in Citizens would have, among other prohibitions, prohibited the City of Riverside from "classif[ying] . . . homosexuality as the basis for determining an unlawful discriminatory practice." Id. at 651.

The Citizens court held that the proposed amendment had no rational basis, in part, because the proposed ordinance had "the patent objective of fostering and furthering private discrimination." Id. at 656. The court noted that the proponents of the proposed ordinance expressed venomous hostility toward gays and lesbians in their Notice of Intent to Circulate the ballot initiative petition, accusing homosexuals of, among other things, routinely practicing repellent sexual acts, spreading communicable diseases, and engaging in sexual acts in public places. Id. at 657-58.

The Citizens court also noted that the proposed ordinance "fails utterly to make any distinction between homosexuals based on actual conduct or deportment" and is "notable for its failure to address any specifically objectionable form of conduct." Id. at 658. This failure to address actual conduct prevented the ordinance from reflecting any valid concerns of public health or prevention of offensive public conduct. Id.

Amendment 2 discriminates against gay men, lesbians,and bisexuals even more explicitly than the ordinance at issue in Citizens: unlike the Citizens ordinance, its text does not apply broadly to both heterosexual and gau and lesbian persons but rather singles out the latter for discriminatory treatment. Moreover, Amendment 2's hostility against gay men, lesbians, and bisexuals is apparent from its legislative history as well as its text. The proponents of Amendment 2 circulated accusations directed against homosexuals that are substantially similar to the accusations

circulated by the proponents of the ordinance in Citizens. See exs. 21,22.

Like the ordinance at issue in Citizens, Amendment 2 burdens "orientation" as well as conduct, indicating a "fail[ure] . . . to make any distinction between homosexuals based on actual conduct or deportment." Like the equal protection challenges in Meinhold and Pruitt, plaintiffs' challenge in this case is not barred by Bowers. Because, as Judge Bayless found, the "moral judgment" expressed by Amendment 2 is nothing more than hostility toward lesbians, gay men, and bisexuals, Amendment 2 does not serve any legitimate purpose. Therefore, Amendment 2 is invalid under the equal protection clause of the Fourteenth Amendment.

2. Amendment 2 Does Not Rationally Advance Any of the Purposes Proffered by Defendants.

Aside from advancing "society's moral judgment," defendants argue that Amendment 2 serves three other purposes. According to defendants, Amendment 2 "promot[es] associational and religious rights, maintain[s] the integrity of established civil rights protections, and achiev[es] statewide uniformity on this divisive issue [of civil rights protections for gay men, lesbians, and bisexuals]." Op. Brf. at 42-43.[23]

Assuming arguendo that these goals are legitimate, the distinctions drawn by Amendment 2 do not rationally advance any of

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[23]The defendants do not attempt to defend as legitimate most of the purposes advanced by CFV for Amendment 2: protection of "traditional family values and structures," protection of children from sexual molestation, reduction of the "deadly consequences" of AIDS and the cost of treating the disease, and promotion of the view that homosexuality can be cured.

these purposes. Amendment 2 is both over-inclusive and under-inclusive for the purposes proffered by defendants. This lack of any fit between the classifications made by Amendment 2 and these three proffered purposes indicates that the purposes are simply pretexts for burdening lesbians, gay men, and bisexuals.

The defendants, of course, are entitled to pursue legitimate goals in a piecemeal fashion: they need not address every aspect of an evil simultaneously. City of New Orleans v. Dukes, 427 U.S. 297 (1976). However, although legislative classifications need not be made with "mathematical nicety," classifications cannot be completely casual, "particularly when a more precise and direct classification is easily drawn." Williams v. Vermont, 472 U.S. 14, 23 n. 8 (1985). See also Long Island Lighting Co., 666 F. Supp. at 423-24. Otherwise, the state may "pick and choose only a few to whom they will apply legislation and thus . . . escape the political retribution that might be visited upon them if larger numbers were affected." Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring).

In Cleburne, for instance, the Court overturned a denial of a special permit for a group home in part because the denial was far too underinclusive to advance rationally the purposes cited by the city. The City of Cleburne advanced several reasons in support of its action, including the "negative attitude of the majority of property owners [near the proposed facility]," the alleged need to protect the residents of the facility from students at a nearby high school, the alleged danger to the facility arising from being

located in a flood plain, and the size and population density of the proposed group home. Cleburne, 473 U.S. at 448-50.

The Cleburne Court noted that the city's denial of a special permit to the group home was underinclusive for the purposes that the denial allegedly advanced. For instance, while the city claimed to be interested in restricting population density and building bulk in the neighborhood, the city allowed as of right numerous buildings with density and bulk identical to the rejected group home. Id. at 449-50.

The Cleburne Court also noted that "this record does not clarify how . . . the characteristics of the intended occupants [of the group home] rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes." Cleburne, 473 U.S. at 450. Lacking record evidence for such different treatment, the Court held that the denial of the special use permit illegally discriminated against the residents of the group home. See also Phan v. Commonwealth of Virginia, 806 F.2d 516, 521 & n. 6 (4th Cir. 1986) ("the simple articulation of a justification for a challenged classification does not conclude the judicial inquiry").

As in Cleburne, if Amendment 2 is underinclusive for the purposes proffered by the defendants, then those purposes will be insufficient to justify Amendment 2. Defendants therefore must advance some record evidence explaining why Amendment 2 burdens only gay men, lesbians, and bisexuals to further the goals suggested by the defendants. Just as the Cleburne defendants were

required to produce evidence indicating why they advanced their alleged purposes only at the expense of mentally handicapped persons, so too, the state must produce some explanation showing wy Amendment 2 advances its alleged purposes only at the expense of lesbians, gay men and bisexuals.

Under the standard in Cleburne, Amendment 2 bears no rational relation to the purposes proffered by the defendants. Amendment 2 is both under- and overinclusive for the purpose of "maintain[ing] the integrity of established civil right protections, and achiev[ing] statewide uniformity" forbidding civil rights protections for gay men, lesbians, and bisexuals. Quite simply, Amendment 2 does not advance -- and even impedes -- the goal of uniformity of civil rights legislation in Colorado.

Amendment 2 does not "simply align[] the rights of citizens throughout the State with those provided by federal law and generally existing throughout the rest of the country." Op. brf. at 10. Even after Amendment 2's enactment, everyone in Colorado except gay men, lesbians, or bisexuals remains free to obtain protections from discrimination exceeding protections provided by federal law -- and such citizens have done so. For instance, discrimination on the basis of heterosexual orientation, familial status and veteran status is prohibited by state or local law in Colorado even though none of these classifications constitute protected categories under federal civil rights law.

Amendment 2 does nothing to prevent this disuniformity. Yet defendants have offered no evidence whatsoever to show, for

instance, how heterosexuals are differently situated from gay men, lesbians, or bisexuals such that heterosexuals can be allowed to pursue remedies beyond those provided by federal law without disrupting uniform legislation. Such completely unexplained underinclusiveness indicates that uniformity is simply a pretext for discriminating against gay men, lesbians, and bisexuals.

Moreover, Amendment 2 prohibits even uniform state-wide civil rights legislation if such legislation protects gay men, lesbians, and bisexuals against discrimination. Amendment 2, therefore, cannot be explained as an attempt to promote uniformity. It actually impedes uniform legislation.

The defendants argue that Amendment 2 "promot[es] associational and religious rights." In support of this contention, they assert that Boulder's and Aspen's ordinances do not exempt religious organizations from all liability for discrimination against gay men, lesbians, and bisexuals. Again, however, Amendment 2 is both overinclusive and underinclusive for the purpose of protecting religious liberty. It prohibits even anti-discrimination ordinances such as Denver's civil rights ordinance that exempts religious organizations. Moreover, it does not prohibit anti-discrimination ordinances that may intrude on religious freedom every bit as much as prohibitions on discrimination against gay men, lesbians, and bisexuals.[24] Likewise, the defendants offer no explanation as to why associational rights are more burdened by prohibitions on

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[24]For instance, Boulder's prohibition against discrimination on the basis of marital status may infringe on certain religions' view concerning the inviolability of marriage.

discrimination against gay men, lesbians, and bisexuals than by other prohibitions on discrimination that Amendment 2 left intact. Apparently, the goal of protecting religious and associational liberty has importance to the defendants only when pursued at the expense of gay men, lesbians, and bisexuals.

In sum, the defendants have offered four justifications for Amendment 2 to counter Judge Bayless's ruling that Amendment 2's purpose is to endorse and effect private bias against lesbians, gay men, and bisexuals. Three of defendants' proffered purposes -- statewide uniformity of civil rights law, maintenance of the integrity of established civil rights protections, and protection of associational and religious liberties -- are obviously pretextual, because Amendment 2 does not make the slightest effort to advance these goals in a rational or consistent manner. The fourth purpose -- expression of social disapproval of gay men, lesbians, and bisexuals in the form of a "moral judgment" -- does not justify Amendment 2: this contention simply indicates that Amendment 2 was motivated by "a bare . . . desire to harm a politically unpopular group," a purpose that "cannot constitute a legitimate government interest." Moreno, 413 U.S. at 534 (emphasis in original).

C. The Defendants' Interpretation of Amendment 2 Concedes that Portions of the Amendment Are Unconstitutional and Indicates that Amendment 2 Is Void for Vagueness, a Concession that Supports the District Court's Ruling.

The defendants attempt to limit the scope of Amendment 2 by stating that the amendment does not mean what it says. Op. brf. at 13. First, they write out of Amendment 2 its reference to "any

. . . branches or departments" of state government.[25] They characterize the plaintiffs as "wrong" for suggesting that the amendment -- on its face -- prohibits the state judiciary from enforcing any claims of discrimination on the basis of sexual orientation. Id. Instead, they argue that the amendment must be read to prevent lesbians, gays and bisexuals from being "wholly defenseless" by allowing any claims "which could otherwise have been brought by those individuals under federal law" to be adjudicated in the state courts. Id. In addition, the defendants assert that -- despite the express language to the contrary in Amendment 2 -- lesbians, gay men, and bisexuals will retain the right to remedy harassment or assaults in state civil and criminal courts and the right to enforce private contractual non-discrimination provisions in state civil courts.[26]

Second, the defendants write in to Amendment 2 a limitation on its enforcement to "state or locally based claims of discrimination." Op. brf. at 16. They acknowledge that Amendment 2 cannot constitutionally prohibit the "enforcement of federally based claims of discrimination." Id. The defendants recognize -- as

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[25]Colo. Const. art. III provides that "[t]he powers of the government of this state are divided into three distinct departments, -- the legislative, executive and judicial . . . ."

[26]A number of corporations that employ Coloradans have employment contract provisions that prevent discrimination on the basis of sexual orientation. Such corporations include AT&T, Adolph Coors Company, Continental Airlines, Eastman Kodak, United Airlines, IBM, J.C. Penney, Sears Roebuck & Co., and US WEST Communications. IV:177. Liability for breach of contract is determined by state courts. See Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987).

they must -- that sexual orientation warrants the protection that is "normally accorded to all citizens under the Equal Protection Clause of the Fourteenth Amendment." Op. brf. at 15. They conclude that "[a]ll Amendment 2 does" is ensure that government -- presumably state and local legislative and administrative bodies -- "will not interfere" with a private citizen's "choice about associating with homosexuals and bisexuals." Op. brf. at 17-18.

The defendants' interpretation bears little resemblance to the language of Amendment 2. The amendment's plain language prevents "any . . . branches or departments" of state government from enforcing "any statute, regulation, ordinance or policy" that would entitle one to make "any . . . claim of discrimination" based on "homosexual, lesbian or bisexual orientation." If a court can determine the electorate's intent from the plain language of a constitutional provision, the court "may not resort to a strained interpretation but must instead apply a constitutional provision according to its clear terms." Carrara Place v. Board of Equalization, 761 P.2d 197, 202 (Colo. 1988).

Referring to pages 16 and 17 of the Legislative Council's analysis of Amendment 2, the defendants argue that the amendment's backers were concerned with nullifying the effect of existing state and local laws or policies and ensuring the state and local authorities could not adopt new laws or policies. Op. brf. at 16. To the contrary, the Council states, "The proposed amendment identifies one area -- discrimination based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships -- in

which civil rights laws and policies could **not** be enacted or enforced by the state government or local governments in Colorado." Ex.17 at 14;defs.appendix at 9. The Council's description does not limit enforcement of civil rights laws and policies by state and local governments to "state and local laws and policies" as the defendants suggest. Op. brf. at 16.

Because Amendment 2's language prevents, for example, a state court from remedying sexual orientation discrimination under federal statutes such as 42 U.S.C. § 1983, the defendants' efforts to read the judicial branch or department out of the amendment is a concession that Amendment 2 as written is unconstitutional. A state constitutional amendment may not preclude state courts from enforcing § 1983 claims. Howlett v. Rose, 496 U.S. 356, 369 n.16 (1990) ("The language of the Supremacy Clause -- which directs that 'the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding' -- and our cases confirm that state courts have the coordinate authority and consequent responsibility to enforce the supreme law of the land.")

Likewise, the defendants' effort to restrict Amendment 2 to "state or locally based claims of discrimination" is a concession that Amendment 2 as written is unconstitutional. The defendants' narrowing interpretation of the amendment trades unconstitutional overbreadth[27] for vagueness. The defendants do not indicate

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[27]A regulatory scheme suffers from constitutional overbreadth if it threatens the existence of protected fundamental rights such as First Amendment rights of speech or association by encompassing

whether "state or locally based claims of discrimination" means only that a claim must arise within Colorado, whether the claim must be based on a provision of state or local law, or if a claim is "based" on a provision of state constitutional law that has a federal analogue, whether the claim is subject to Amendment 2.

A statute may be unconstitutionally vague if it "forbids or requires the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess as to its meaning and differ as to its application." Regency Services v. Board of Cty. Com'rs, 819 P.2d 1049, 1055 (Colo. 1991). A civil enactment violates due process requirements when it contains language so vague that it fails to provide fair notice of what conduct is prohibited. Sellon v. City of Manitou Springs, 745 P.2d 229, 233 (Colo. 1987).

The defendants' concessions that the plain language of Amendment 2 is unconstitutional support the district court's issuance of a preliminary injunction. Moreover, if this court accepts the defendants' narrowing construction, then Amendment 2 is unconstitutionally vague because it fails to give notice of what conduct is prohibited. Finally, the defendants' narrowed interpretation of the amendment leaves intact the plaintiffs' arguments that Amendment 2 burdens their fundamental right to participate in the political process and that the amendment lacks a rational basis for the unique burdens that it places on gay men, lesbians and bisexuals.

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protected rights within the scheme's prohibition. Colorado Dog Fanciers v. Denver, 820 P.2d 644, 650 (Colo. 1991); Regency Services v. Board of Cty. Com'rs, 819 P.2d 1049, 1059 (Colo. 1991).

CONCLUSION

The plaintiffs request the court to affirm the district court's entry of a preliminary injunction, to rule that there is a reasonable likelihood that they will succeed in showing that Amendment 2 is unconstitutional, and to remand the case to the district court for trial on the merits of their equal protection claim as well as for trial on their other claims pending before the district court.

DATED this 3rd day of May, 1993.

Respectfully submitted,

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THE POLITICS OF THE CLOSET: TOWARDS EQUAL PROTECTION FOR GAY, LESBIAN, AND BISEXUAL IDENTITY

Janet E. Halley*

In the summer of 1986, the U.S. Supreme Court made it resoundingly clear that no fundamental privacy right attaches to consensual homosexual sodomy.[1] *Bowers v. Hardwick* forged an equally indubitable link between the question of homosexual rights under the Constitution and the proper scope of judicial review of legislative decisions. Invoking the specter of *Lochner v. New York* and "the face-off between the Executive and the Court in the 1930's," Justice White's majority opinion argued that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizible roots [sic] in the language or design of the Constitution."[3] Chief Justice Burger concluded in his concurring opinion, "[t]his is essentially not a question of personal 'preferences' but rather of [sic] the legislative authority of the State."[4] By refusing to extend its substantive due process jurisprudence, the Court remanded gay men

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APPENDIX A